



August 10, 2000

Ms. Larissa T. Roeder
Assistant District Attorney
County of Dallas
Frank Crowley Courts Building, LB19
Dallas, Texas 75207-4399

OR2000-3050

Dear Ms. Roeder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137925.

The Dallas County District Attorney's Office (the "district attorney") received a written request for "all evidence, files and other information regarding the prosecution of" a named individual with regard to three specific criminal prosecutions. You state that the district attorney has been able to locate only one of the requested prosecution files. You contend that portions of that file are excepted from disclosure under section 552.101 of the Government Code.

We note at the outset that more than ten business days have elapsed between the date the district attorney received the records request and the date of your request for a decision from this office in this matter. See Gov't Code § 552.301(b). Section 552.301(b) of the Government Code requires a governmental body to request a decision from the attorney general within ten business days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten business days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.-Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. See *Hancock*, 797 S.W.2d at 381; see also Open Records Decision No. 150 (1977).

However, the fact that information is made confidential by law found outside the Public Information Act constitutes a compelling demonstration that the information should be withheld from the public. *See* Open Records Decision No. 150 (1977). Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including the common law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

The records at issue pertain to an instance of aggravated sexual assault. You contend that the identity of the assault victim is protected by common law privacy. Clearly, information pertaining to an incident of sexual assault raises an issue of common law privacy. Open Records Decision No. 339 (1982). In Open Records Decision No. 339 (1982), this office concluded that “a detailed description of an incident of aggravated sexual abuse raises an issue of common law privacy” and therefore any information tending to identify the assault victim should be withheld pursuant to common law privacy. *See also* Open Records Decision No. 393 (1983).

We note, however, that some of the documents at issue appear to contain information that may be a matter of public court record, *i.e.*, an indictment, an arrest warrant, and accompanying affidavit. Each of these documents contains the identity of the assault victim. If, in fact, the victim’s identity is a matter of public court record, the district attorney may not now withhold the identifying information you have highlighted on privacy grounds. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (no privacy interest in information contained in public court records). On the other hand, if the victim’s identity does not appear in court records pertaining to the prosecution of this case, the district attorney must withhold the information you have highlighted pursuant to section 552.101 of the Government Code in conjunction with the common law right of privacy.

Some of the documents at issue also contain the criminal history of the criminal defendant. Where an individual’s criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual’s right to privacy. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Similarly, open records decisions issued by this office acknowledge this privacy interest. *See* Open Records Decision Nos. 616 (1993), 565 (1990). Accordingly, we conclude that the district attorney must withhold on privacy grounds the criminal defendant’s compiled criminal history.

Additionally, the district attorney must withhold pursuant to statutory law all criminal history information obtained from the TCIC and NCIC. The dissemination of criminal history information obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each

state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain criminal history information; however, a criminal justice agency may not release that information except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1).

We also note that some of the records before us constitute the rape victim's medical records. These medical records are made confidential under the Texas Medical Practice Act (the "MPA"), Occ. Code § 151.001 *et. seq.* Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Consequently, access to the medical records before us are governed by chapter 159 of the Occupations Code and the district attorney must release or withhold those records in accordance with those provisions.

Finally, you contend that the juror information cards contained in the prosecution file are made confidential by article 35.29 of the Code of Criminal Procedure. Article 35.29 provides as follows:

Information collected by the court or by a prosecuting attorney during the jury selection process *about a person who serves as a juror*, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court *in which the person is serving or did serve as a juror*. On a showing of good cause, the court shall permit disclosure of the information sought. [Emphasis added].

Article 35.29 makes confidential certain personal information pertaining to only those individuals who actually served on the petit jury in a criminal trial. We have marked the types of information on the first four cards contained in Exhibit 5 that the district attorney

must withhold with regard to the jurors who served on the petit jury. The district attorney must release the remaining information on the juror cards to the requestor.

In summary, the district attorney must withhold the criminal defendant's criminal history information and the information we have marked in the juror information cards pursuant to section 552.101 of the Government Code. The victim's medical records may be released only in accordance with the MPA. The district attorney must withhold the information you have marked that identifies the sexual assault victim, but only if the identifying information does not also appear in public court records.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

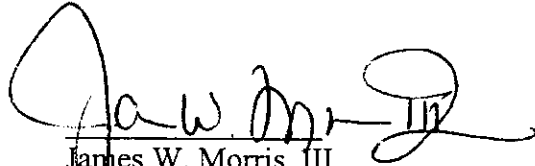
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a stylized "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/ljp

Ref: ID# 137818

Encl. Submitted documents

cc: Mr. Roger D. Martin
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
17000 Pacific Avenue, Suite 4100
Dallas, Texas 75201
(w/o enclosures)